Freedom to Move

a framework for transportation reform

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THE NEED FOR CHANGE - THE GOVERNMENT'S PERSPECTIVE

In this paper, the Government of Canada puts forward specific proposals for economic regulatory reform in the transportation sector. In developing these proposals, I, as Minister of Transport, have been guided in particular by the following principles:

(a) Less regulation, leading to less government interference, will encourage innovation and enterprise;

(b) Greater reliance on competition and market forces will result in lower unit costs, more competitive prices, and a wider range of services to shippers and the public;

(c) Canadians require a regulatory process that is open, accessible, and not excessively costly or time consuming.

A policy and legislative framework based on these principles will allow Canada's transportation system to contribute efficiently and effectively to our future growth and prosperity.

Transportation is the cornerstone of all modern economies. This statement is especially true for Canada, with its large geographic area and small population. Moreover, we are a trading nation that must export in order to grow and prosper. It is therefore crucial for our economic well-being that we maintain an efficient, responsive and productive transportation system.

Canada's transportation system is the physical bond that holds together the diverse regions of this vast country. Throughout the land - the most remote and the most heavily populated regions alike - the system moves people for business and pleasure and industrial goods and raw materials for the market. For both of these reasons transportation in Canada has been an important instrument of public policy ever since the last spike was driven in the Canadian Pacific Transcontinental Railway one hundred years ago.

Over the last century, our transportation system and the economic structure in which it operates have changed dramatically, and since World War II the pace of change has been steadily accelerating. Today we face a tough and competitive global marketplace where success depends upon transportation more than ever before.

Unfortunately, our regimes of economic regulation in transportation have kept pace with neither changing circumstances in our economy nor the transportation system itself. The last major change in regulation took place nearly 20 years ago with the passage of the National Transportation Act. In the environment of the 1980s, the existing regulatory regime represents an obstacle to economic growth, innovation and competitiveness.

We must do everything we can to promote an efficient, responsive and productive transportation system. The Government must facilitate and encourage, rather than obstruct and intervene. We must allow the system to operate under market conditions and allow business to play its proper role in fostering economic growth.

Safety is also a major priority for all involved in the transportation sector. This Government's commitment to safety is clear. Our regulations concerning the transportation of dangerous goods came into effect on July 1. The amendments to the *Aeronautics Act* passed by Parliament in June provide Canada with its most progressive aviation safety legislation in sixty years.

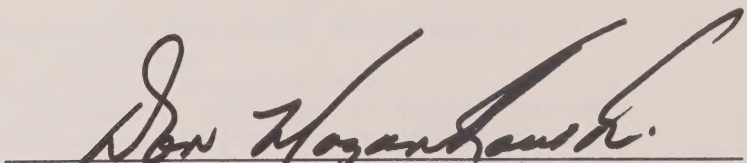
I would like to indicate unequivocally that the Government will neither propose nor permit any economic regulatory reform that might be detrimental to safety standards.

The Government recognizes that the changes proposed to economic regulation of transportation may, in rare circumstances, such as for essential air services in remote areas, result in transitional difficulties for certain users. In such circumstances, a policy of selective government action, using the services of the market as much as possible, will ensure assistance for cases of greatest need.

The total package of proposed reforms constitutes a major shift in policy and practice. The transition from the existing regime to the new one will require adjustments on the part of all concerned. The Government will do all it can to minimize inconvenience during the transition, but will also be counting heavily on the co-operation of all affected parties in achieving this goal.

Over the past several months, many individuals, companies and groups have responded to my invitation to make their views known on regulatory reform. Informal consultations have taken place on the appropriate direction of transportation policy. At my request, the Canadian Transport Commission has held hearings on the effects of U.S. rail deregulation in Canada. The clear consensus is that significant reform of economic regulation is required in the transportation sector. Now is the time to act.

The Government welcomes comment on these proposals for new directions in transportation policy and for a revised framework of legislation. Following a period of discussion and comment on these specific proposals, legislation will be prepared and introduced in Parliament by the end of this year.



The Honourable Don Mazankowski, P.C., M.P.
Minister of Transport

July, 1985

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Introduction

It has been almost 25 years since the last substantive review of Canada's transportation legislation. The MacPherson Royal Commission Report was issued in 1961. That review became the basis for the *National Transportation Act* (NTA) of 1967.

Much has changed in transportation since then. The industry has matured. Trucking has flourished while railways have become more specialized carriers with much of their traffic in bulk commodities. Air traffic has tripled, and a much wider diversity of air services is now offered. Transportation services utilizing more than one mode (multimodal) have grown in importance, while shippers' needs have become more varied. Proportionally fewer Canadians are travelling by train and bus, and the automobile continues its dominance. A movement to deregulation has occurred in the United States, Canada's major trading partner. Greatly increased domestic and international competition has become a fact of life for Canadian producers and manufacturers.

The NTA and other transportation legislation represent a philosophy of regulation that has become outmoded. The legislation assumes that transportation markets are immature and carriers need protection. Users, too, are overcontrolled with regulatory authorities establishing the terms and conditions on which business may be done with carriers. The regulatory regime has restricted competition and enterprise and has often led to increased costs and a limited choice of services.

As the transportation sector matures, regulation should be relaxed and simplified to allow the system to respond to the changing needs of shippers and the travelling public. Restrictions reducing competition and inhibiting cost reductions should be eliminated: diversity and initiative should be promoted. Regulations, and the agency that administers them, should become more flexible, more accessible to Canadians and less legalistic. Mediation and less-formal resolution of disputes should be encouraged.

As stated in the document A New Direction for Canada: An Agenda for Economic Renewal (November 8, 1984), important opportunities now exist for removing obstacles to the growth and competitiveness of Canada's transportation industries. A new transportation policy and legislative framework are required in order to meet the realities of the 1980s and 1990s and to provide a solid foundation from which to meet the challenges and opportunities of the next century.

The loosening of air transportation regulations in 1984 resulted in some moderation in air fares and a wider range of air services but many cumbersome regulations are still in place. In trucking, progress has been made with the provinces towards further regulatory reform and towards the simplification and streamlining of remaining regulation. However, federal legislation still lags behind the agreed reforms. In rail, little progress towards regulatory reform has been made even though our railroads are losing transborder business to American railroads. In deep-sea shipping, Canadian shippers require greater freedom of action with respect to shipping conferences.

The Government wants a new legislative framework for Canadian transportation that will minimize government control over shippers and carriers while ensuring that the public interest is met. Competition will be emphasized. Dispute resolution will be streamlined and made less cumbersome. A new Regulatory Agency will be smaller and more accessible. The emphasis will be on providing transportation services at the lowest possible cost, subject only to the overriding priority of a high level of safety.

The Government recognizes the contribution of tens of thousands of workers to the development and operation of our transportation system. Maintaining a climate of positive and co-operative labour relations will be required in order to implement effectively the changes needed to meet the competitive economic environment of today and the future. In this connection, the Government will monitor the effects of change on employees and in consultation with representatives of employees and employers determine appropriate adjustment mechanisms and other measures designed to respond to any adverse consequences as humanely as possible.

The Government has reviewed the existing transportation legislation and regulation. This paper outlines the Government's agenda for legislative and regulatory reform. The proposals, as modified by persuasive public reaction, will form the basis of legislation updating the NTA and the economic provisions of related acts.

The thrust of these proposals, reliance on competition and market forces rather than regulations, is clearly the wave of the future.

The Government realizes, however that the proposed changes, while leading to a more efficient and effective transportation system that will serve Canadians at lower cost, may involve some transitional problems in isolated cases. With this in view, the Government proposes to review the effects of the legislative reform proposed in this paper within four years of the new legislation coming into effect.

Principles and Directions

The new policy for the economic regulation of transportation will be based on the following principles:

1. Less regulation, leading to less government interference, will encourage innovation and enterprise.

2. Greater reliance on competition and market forces will result in lower unit costs, more competitive prices, and a wider range of services to shippers and the public.

3. Inflexible, restrictive regulation is an obstacle to growth, innovation, and competitiveness.

4. Canadians require a regulatory process that is open, accessible, and not excessively costly or time consuming.

5. Government should provide direct support to those transportation services that, though not economically viable, are deemed to be in the public interest. In this regard, users should also bear their fair share of costs.

6. Measures should be taken to assist those who might suffer severe economic dislocation under a new regulatory regime.

Summary of Proposals

Each of these proposals is presented in detail later in the paper.

TRANSPORTATION POLICY OBJECTIVES

--The statement of transportation policy objectives, contained in Section 3 of the NTA, will be revised so as to promote actively both intramodal and intermodal competition; greater efficiency and the lowering of total unit costs for all transportation services; the reduction of the burdensome intervention of government in the marketplace by minimizing the extent and complexity of regulation imposed on carriers, shippers, and other users; and a regulatory process that is more open, flexible and accessible to all Canadians.

ECONOMIC REGULATION ISSUES

--The revised legislation will contain new, more flexible, regulatory criteria specific to each of the individual modes.

--Section 3 and Section 27 of the NTA will be revised to encourage greater freedom and flexibility in domestic arrangements, mergers and acquisitions to facilitate multimodalism where appropriate.

--Current restrictions on mergers and acquisitions within the industry will generally be relaxed so as to foster a less regulated environment where market forces play a larger role. However, the Governor-in-Council will be empowered, on his own motion or on the recommendation of the Minister of Transport, to disallow domestic mergers and acquisitions of control of major federally regulated transportation undertakings with gross assets valued at $20 million or more.

--The revised Act will provide for compensation for imposed public duties in order to overcome the disadvantages of the current legislation.

--Departmental operations will be streamlined to reduce the administrative burden, to provide best value for the taxpayers' dollar and to promote competition in the marketplace, subject to the essential requirement that transportation safety not be compromised. The need for new capital expenditures will be carefully examined. Crown Corporations in transportation will be expected to be effective and efficient while operating as good corporate citizens.

AIR TRANSPORTATION

--Entry to any class of domestic commercial air service will be governed by a "fit, willing and able" requirement. Any operator complying with Department of Transport safety regulations for operating certification and submitting proof of adequate insurance coverage will be deemed to meet this requirement.

--Market exit will not be impeded except by a requirement of advance notice.

--There will be no ongoing regulation of domestic tariffs; however, the new Regulatory Agency that the Government is proposing will be empowered, on appeal under an amended Section 23 of the NTA, to review fare increases, and to overturn or reduce such increases. For public-information purposes, carriers will be required to make their tariffs and tolls available at their business offices and to retain a record of all such tariffs and tolls for a minimum of three years.

--Air carriers will be able to structure their financing and aircraft acquisition to meet changing operating requirements. Carriers will be required to have adequate liability insurance, the minimum amounts of which will be specified in regulations pursuant to the revised legislation.

--Authority for the Minister of Transport to designate Canadian carriers on international routes will be provided for in legislation.

--The Canadian Government will be empowered to retaliate against discriminatory or unfair commercial practices by a foreign government or air carrier and against actions jeopardizing the safety of international civil aviation.

RAILWAY FREIGHT[1]

--Section 279 of the *Railway Act* which enables the exchange of information and the establishment of common rates among the railways and Section 32(2) of the *Transport Act* which deals with agreed charges will be repealed. Confidential contracts will be permitted between a railway and a shipper for all domestic, overseas import/export, and transborder traffic, exclusive of grain shipments governed by specific legislation. Rebates will be allowed. No appeals will be allowed from confidential rate contracts.

--All confidential contracts and those published tariffs covering shipments that qualify for subsidy under the *Maritime Freight Rates Act* (MFRA) or the *Atlantic Region Freight Assistance Act* (ARFAA) will be filed. All other published tariffs will be retained for public scrutiny in the offices of the railways concerned, pending review after four years.

--Common-carrier obligations will be retained in full for all shippers, but the obligation contained in Section 262 of the *Railway Act* may be modified by agreement of those operating under confidential contracts.

--Section 278 of the *Railway Act* which provides for the fixing of maximum rates for captive shippers has been ineffective and will be repealed. Shippers formerly having access to the line of only one rail carrier will have access to the lines of competing carriers.

1. This document does not address rail passenger services. That subject will be dealt with in the proposed "Rail Passenger Transportation Act".

--In instances where the public interest or consideration of the economy and efficiency of the rail system justifies the imposition of joint-track usage or shared railway running rights, the Governor-in-Council will be empowered a) to elicit railway co-operation and b) to authorize the Regulatory Agency to determine appropriate compensation for the use of the right-of-way concerned.

--Section 276 of the *Railway Act* requires that a railroad's rates be compensatory. This section will be made subject to a sunset provision under which it will be repealed in five years. During that five-year period, railways may apply to the new Regulatory Agency for limited use of non-compensatory rates for market-development purposes. Anticombines legislation will apply to predatory pricing.

--The Government proposes to adopt a comprehensive approach to branch-line abandonment that will facilitate the development of innovative options for improving transportation services and the continued use of branch-lines where feasible. An additional protection for "grain-dependent" branch lines will be maintained; the Order-in-Council that protects the majority of these will have to be altered before abandonment proceedings commence. Under appropriate circumstances, lines other than branch lines may be abandoned.

EXTRAPROVINCIAL TRUCKING

--The Government proposes to revise the *Motor Vehicle Transport Act* (MVTA) to reflect the conditions of the agreement signed by the federal and provincial Ministers of Transport on February 27, 1985. The Government will also change the current NTA criteria for entry and rates.

MARINE TRANSPORTATION

--The Government proposes to revise the *Shipping Conferences Exemption Act*. While shipping loyalty (patronage) contracts will still be possible, confidential contracts with individual conference members will also be permitted. Shipping conferences will be allowed to quote multimodal rates, but safeguards against collusion in the setting of such rates will be implemented and independent carrier action encouraged.

--The *Canada Shipping Act* will be revised to reserve the coasting trade for Canadian ships; to extend the jurisdiction of the Act to 200 nautical miles or to the limits of the continental shelf, whichever is greater; to expand the scope of the Act to include all commercial marine activities except for fishing; and to retain the waiver system, with specific provision for conditional exemptions.

--The Government proposes to repeal the *Inland Water Freight Rates Act* and the provisions of the *Transport Act* pertaining to the Great Lakes area.

--The Government proposes to license northern community resupply services on the basis of total ship tonnage and the geographical scope of services.

--The Government proposes to authorize northern licences for indefinite as well as for fixed durations, as circumstances require, including licences of charter operations.

--Northern carriers will be required to file one set of freight rates based only on weight and distance, taking into account geographical and navigational differences for specific areas of the regulated system. The tariffs will be made public but will not require the Regulatory Agency's approval. Rates may be overruled by the Regulatory Agency on grounds of discrimination or unreasonableness, as proven by users through the dispute-resolving mechanisms mentioned in the paper.

--The Government proposes to exclude from regulation all charter or unscheduled services operated in support of northern resource exploration and development.

COMMODITY PIPELINES

--The Government proposes to greatly relax the regulatory process for licensing commodity pipelines. There will be a "fit, willing and able" entry requirement, but no rate regulation. The Minister of Transport will be responsible for regulating the safety of such lines.

THE REGULATORY PROCESS

--In keeping with the spirit of regulatory reform, a new independent Regulatory Agency will be created to replace the Canadian Transport Commission.

--The revised legislation will confer upon the Minister, with the approval of the Governor-in-Council, the power to issue policy directions to the Regulatory Agency on matters falling within the jurisdiction of the Agency and will make such policy directions binding on the Agency in its consideration of matters before it.

--The Regulatory Agency will be empowered to inquire into, hear and report on any transportation matter that, in the opinion of the Minister, affects the public interest.

DISPUTE-RESOLVING MECHANISMS

--The Government proposes that a mediation function be included in legislation as a relatively informal means of resolving disputes between shippers and carriers.

--Section 23 of the NTA will be retained in modified form. The Government will eliminate the requirement that a *prima facie* case be established before the Regulatory Agency may grant leave to appeal and proceed with an investigation. Section 23 will be clarified to confirm that shippers served by only one carrier in a specific mode have access to the appeal process. The legislation will also allow the Regulatory Agency a choice between a public hearing or a file hearing and will provide for the refund of rates charged and later found to be excessive. Time limits for the different stages of the appeal process will be established.

--Legislation will incorporate a final-offer arbitration mechanism for resolving disputes of private or narrow interest.

--The review function currently performed by the Review Committee of the CTC will be discontinued. The Governor-in-Council and the courts are sufficient avenues of appeal.

--The Governor-in-Council will be empowered to vary or rescind, at any time, either on petition from a person or party or on his own motion, any order, decision, rule or regulation of the Regulatory Agency.

--Current legislative provisions that permit appeals to the Minister in licensing matters involving commercial air services, motor-vehicle undertakings and transport by water will be repealed.

--An appeal from the Agency to the courts upon a question of law or of jurisdiction, would continue to apply.

Structural Change Since 1967

Transportation is a derived demand, dependent on the nature and level of economic activity both within a country and among its trading partners. Since 1967, transportation has contributed an annual average of about 5.8 percent of this country's total real economic output but in a country as vast as Canada the full significance of transportation is immeasurable. Every day, approximately 160,000 Canadians travel by one of the public intercity modes - air, bus or rail; moreover, 1.7 million tonnes of freight are moved daily by rail, for-hire truck or water.

Since 1967, Canada's increasingly diversified economy has created a wider range of transportation needs and a better-balanced range of transportation services to meet them. Resource commodities, moving in bulk by rail or ship, still represent a significant volume of our domestic and international freight flow. Trucking, however, has captured some of this market, as well as a significant share of the traffic in goods of higher value and lower bulk. In addition, the amount of air freight is increasing substantially, particularly for high-value or time-sensitive goods.

The fall in rail's share of traffic and the increase in trucking are evident in Table 1, which shows tonnages moved by rail, marine and for-hire trucking from 1965 to 1983. On the basis of revenue, rail's share of freight movements has fallen even more, from about 55 percent in 1966 to about 37 percent in 1983. For-hire trucking's revenues have risen from about 30 percent to about 44 percent of all freight carriers' revenues.

Table 1
Freight Movements by Rail, Marine, and Truck

	1965		1976		1983	
	Millions of Tonnes	%	Millions of Tonnes	%	Millions of Tonnes	%
Rail	171,416	43.2	234,181	41.2	220,163	36.3
Marine	171,277	43.1	225,254	39.7	246,004	40.5
For-Hire Truck**	54,274*	13.7	108,157	19.1	140,676	23.2
Total	396,967	100.0	567,592	100.0	606,843	100.0

* Estimate
**Tonnages not available for private trucking.

Growth in the numbers of travellers and in the variety of Canadian requirements for business and non-business travel has resulted in a greater diversity of air services. The number of passengers carried by Canadian airlines has more than tripled since 1967, the annual total having risen as high as 28.5 million before declining somewhat during the recent recession to 24 million in 1984.[2]

The performance of the other public passenger modes, rail and bus, has been significantly weaker than that of air since 1967 (see Table 2). Both rail and bus have declined in market share. Rail traffic has fluctuated between 5 million and 7.8 million passengers annually. Bus traffic has approximated 32 million passengers annually during most of the period, except for 1984, which saw a decline to an estimated 28.5 million.

2. Almost 40 percent of the total airline traffic consists of travellers to the United States and other international destinations.

Table 2
Domestic Intercity Passenger Traffic

	1965*		1976		1984	
	Millions of trips	%	Millions of trips	%	Millions of trips	%
Auto	134.0	75.8	228.8	81.9	275.2	84.6
Air**	2.9	1.6	12.3	4.4	15.0	4.6
Rail	8.0	4.5	5.3	1.9	6.5	2.0
Bus	32.0	18.1	33.0	11.8	28.5	8.8
Total	176.9	100.0	279.4	100.0	325.2	100.0

* Estimate.
**Excludes traffic to the United States and other international destinations.

The *National Transportation Act* (1967) appeared at a time of economic growth and expansion. The transportation sector was experiencing strong growth based on investment in new technology and infrastructure, much of it at public expense. Consequently, productivity in transportation increased substantially.

Since the mid-1970s, the overall performance of the transportation sector has been characterized by lower productivity gains, reduced new investment and higher energy prices. Latterly, improvements in productivity have been more evident in transportation than in the economy as a whole but inflation and high interest rates have inhibited new investment in the sector.

Canada now faces a period of economic renewal with economic growth expected to be solid. Our producers, confronted with increased competition in world markets, need efficient transportation. Our transportation system, subject to increased competition from a deregulated U.S. system, requires more freedom and flexibility to respond successfully to market pressures.

To meet the demand for both freight and passenger service, the Canadian transportation system has matured and become more diversified since 1967. The various modes have established markets and now have less need for the regulatory protection offered by governments so often in

the past. Transportation now requires a less restrictive regulatory environment if it is to meet the challenges of the coming years. Greater competition between carriers will provide shippers and passengers with a wider choice of services and lead to a more efficient and effective transportation system.

Proposals for Discussion

The following chapters describe the Government's proposals for new legislation that will incorporate the policy already presented. The proposals cover the economic regulation of transportation under federal jurisdiction, according to the following categories:

- Transportation Policy Objectives
- Economic Regulation Issues
- Air Transportation
- Railway Freight
- Extraprovincial Trucking
- Marine Transportation
- Commodity Pipelines
- The Regulatory Process
- Dispute-Resolving Mechanisms.

Following a summary of the proposals, the text details, and provides supporting arguments for, the Government's preferred course of action for each category. It is the Government's intention to discuss these proposals with interested Canadians and to proceed, by the end of 1985, with legislation to reform the economic regulation of transportation in Canada.

Transportation Policy Objectives

The statement of transportation policy objectives, contained in Section 3 of the NTA, will be revised so as to promote actively both intramodal and intermodal competition; greater efficiency and the lowering of total unit costs for all transportation services; the reduction of the burdensome intervention of government in the marketplace by minimizing the extent and complexity of regulation imposed on carriers, shippers, and other users; and a regulatory process that is more open, flexible and accessible to all Canadians.

Transportation regulatory reform in Canada, as in other nations, comprises both legislative and administrative measures. Over the past few years, some administrative steps have been taken to begin the reform process. Further reform, however, is hindered by specific provisions in legislation.

The *National Transportation Act* of 1967, the chief legislation that established present policy and regulatory practices, contains an explicit statement of transportation policy. The NTA and related acts governing each mode have emphasized intermodal competition. Today, it is becoming imperative that more competition be generated not only between modes but also within each mode.

There is no compelling reason to discard the heart of the NTA statement of objectives, which calls for "an economic, efficient and adequate transportation system...". It is in the subsequent parts addressing the means whereby these objectives are to be achieved that the policy statement needs to be changed in order to meet current realities.

The new statement will also explicitly promote intra-modal competition (for instance, between railways) as well as intermodal competition (for instance, between railways and trucks). It will espouse minimal government intervention and permit more flexibility. It will recognize the needs of those in small or remote communities, where low traffic volumes or long distances make it difficult to have a competitive environment.

The new statement of transportation policy objectives will recognize that transportation is a service industry to assist Canadian shippers in meeting the competitive demands of the future.

Economic Regulation Issues

Under the current regulatory regime, government takes an active role in determining the types, locations and prices of transportation services to be offered. Such a role for government is no longer necessary in the more mature, dynamic markets found in Canada today.

REGULATORY TESTS AND REQUIREMENTS

The revised legislation will contain new, more flexible, regulatory criteria specific to each of the individual modes.

For the sake of simplicity and equality, it would be desirable to have one set of regulatory criteria for all modes and carriers. Unfortunately, the modes are so different that it is very difficult to apply one set of criteria to all modes in all markets. Instead, the economic regulations proposed in respect of each mode will be specified in the modal sections of the revised Act.

MULTIMODALISM

Section 3 and Section 27 of the NTA will be revised to encourage greater freedom and flexibility in domestic arrangements, mergers and acquisitions to facilitate multimodalism where appropriate.

Since the passage of the NTA in 1967, the container revolution has changed the way in which shippers view transportation. The various modes are sometimes co-ordinated, sometimes competing. The market served by shippers and carriers has grown remarkably. To remain competitive in international markets, shippers must receive fast and comprehensive service using a variety of modes.

In recognition that services of this nature (i.e., combined marine, rail, air, and/or trucking) are potentially very efficient, the Government means to encourage the development of multimodal services that will provide shippers with better service.

MERGERS AND ACQUISITIONS

Current restrictions on mergers and acquisitions within the industry will generally be relaxed so as to foster a less regulated environment where market forces play a larger role. However, the Governor-in-Council will be empowered, on his own motion or on the recommendation of the Minister of Transport, to disallow domestic mergers and acquisitions of control of major federally regulated transportation undertakings with gross assets valued at $20 million or more.

The CTC now has certain legislated responsibilities regarding mergers and acquisitions among Canadian transportation firms. Section 27 of the NTA, for example, requires that any transportation firm intending to acquire any interest in another transportation firm give notice to the CTC. On being notified, the CTC determines whether there are objections, which it then investigates, often through public hearings.

On the basis of such investigation, the CTC may disallow the merger or acquisition. There are no restrictions on a non-transportation firm's acquiring an interest in one or several transportation firms.

Removing all restrictions from transportation legislation could clearly re-establish market primacy and reduce government's role in regulating transportation firms. Many Canadians believe, however, that transportation is not just another business, but rather an essential service that unites Canada and promotes national markets. Since transportation services underlie almost every business transaction, transportation is important enough to be treated as a special case.

The revised legislation will have provisions for discretionary Governor-in-Council powers to disallow domestic mergers and acquisitions of control of major transportation firms in the national interest - powers beyond those contained in general legislation applying to other firms. These powers will apply to acquisition of assets or control of federally regulated transportation undertakings valued at $20 million or more, by provinces, companies, associations, or individuals. By making these provisions applicable only to undertakings having gross assets of $20 million or more, the Government will ensure that attention focuses only on the more important transactions. This provision will complement the application of anticombines legislation.

The acquisition of control by foreign interests of transportation undertakings in Canada will generally be subject to review under the *Investment Canada Act*. This Act will ensure that such ventures benefit the Canadian economy.

COMPENSATION FOR IMPOSED PUBLIC DUTIES

The revised Act will provide for compensation for imposed public duties in order to overcome the disadvantages of the current legislation.

In the current regulatory regime, compensation for imposed public duties (uneconomic services which carriers provide only because of a government request) takes the form of direct operating subsidies in some cases, but often involves subsidy mechanisms such as cross-subsidies and cost-plus formula subsidies.

Cross-subsidies are often hidden subsidies. When market divisions exist whereby a carrier is granted certain profitable routes in return for providing service on unprofitable ones, it is difficult to quantify the costs or benefits to the carrier, the user, or government. Certainly, such route arrangements deny the user the benefits of competition, and higher prices are required on profitable routes in order to pay the subsidy on the unprofitable routes.

Cost-plus formula subsidies, such as those formerly applied to rail passenger services, are unsatisfactory because they do not encourage efficiency or innovation. Historically, such formulas have not provided incentives for carriers to reduce costs.

In a less regulated environment characterized by greater competition and reliance on market forces, the imposition of public duties on carriers must be clearly seen for what it is - direct public subsidy. Keeping the public costs visible will enhance accountability and will increase value for money. Under reduced regulation, carriers will be able to start and stop services largely according to their business judgment. It will then remain for government to decide whether to solicit bids for continuing a service that carriers deem unprofitable. Direct subsidies should and will be open business contracts between government and carriers, using the services of the market (e.g., open tendering) to determine fair market values. This policy of selective government intervention will clearly limit assistance to cases of greatest need. The policy will be reviewed after four years.

FEDERAL OPERATIONS IN TRANSPORTATION

Departmental operations will be streamlined to reduce the administrative burden, to provide best value for the taxpayers' dollar and to promote competition in the marketplace, subject to the essential requirement that transportation safety not be compromised. The need for new capital expenditures will be carefully examined. Crown Corporations in transportation will be expected to be effective and efficient while operating as good corporate citizens.

The government is involved in many of the operations of the transportation system, through activities of the Department of Transport and of transportation Crown Corporations. The regulatory reform of transportation activities and the need to operate more effectively and efficiently will have important consequences in these federal areas.

The Department will make every effort, consistent with safety and security requirements, to reduce the administrative burden of its operations on carriers and to ensure that existing facilities are being efficiently used before new capital expenditures are made. Operational activities will be conducted in a more commercial manner and will encourage freer competition among carriers. For example, as announced in the May Budget, options for a new self-sustaining system for managing federal airports are being developed.

Transportation Crown Corporations will be discouraged from engaging in non-business-like pricing and in loss-making commercial activities. The Government is sensitive to criticism that Crown Corporations may unfairly cross-subsidize their operations. Particular emphasis will be devoted to ensuring that the transportation Crown Corporations operate as good corporate citizens.

Air Transportation

Air transportation strongly influences the ability of many other sectors to compete in both domestic and foreign markets. With the vast distances that separate the population, it is essential that Canada have an efficient and competitive air transportation industry, capable of moving people and goods quickly and efficiently.

Last year's modification of domestic air policy reduced regulation of the airline industry by removing the definition of air-carrier roles, by removing licence restrictions, by allowing greater price flexibility and by streamlining the CTC's administrative processes. Although the process of regulatory reform has thus already begun, several major issues remain unaddressed and further reform is necessary.

The domestic airline industry has now reached the point where continued economic regulation serves largely to frustrate air carriers, shippers and the travelling public. Reform must now be continued through change in the legislative base for economic regulation. The legislation was last revised in 1967, with passage of the *National Transportation Act* and revisions to Part II of the *Aeronautics Act*. The Government now proposes to reduce economic regulation to a minimum in pursuit of the following objectives:

- improvement or expansion in services to the travelling and shipping public;
- reasonable opportunities for all sizes and types of carriers to compete in the domestic market;
- removal of all unnecessary expense and paperburden from industry and government alike; and
- encouragement of a pricing regime that provides travellers and shippers with a competitive product.

At the same time the Government remains committed to air safety. In June, Parliament passed amendments to the *Aeronautics Act*. These changes give Canada its most progressive air safety legislation in more than 60 years and encompass all aviation, from the activities of weekend pilots to the operations of the national airlines. The legislation strengthens enforcement powers, increases fines, and protects federal and provincial interests in airport sites. It broadens safety regulation in areas such as the airworthiness of aeronautical products, the location of airports, and the provision of air navigation services - areas becoming increasingly important to the safety of aviation. The changes implement the recommendations made by the Commission of Inquiry into Aviation Safety in respect of enforcement and provide for new penalties and new administrative means of enforcement through assessment of monetary penalties.

The passage of the *Aeronautics Act* amendments places safety regulation on a sound, modern footing, in keeping with the Government's determination that economic regulatory reform must not have adverse implications for public safety.

The following sections outline the major economic reform proposals for the air mode.

REGULATION OF ENTRY CONTROL

Entry to any class of domestic commercial air service will be governed by a "fit, willing and able" requirement. Any operator complying with Department of Transport safety regulations for operating certification and submitting proof of adequate insurance coverage will be deemed to meet this requirement.

Economic regulation of commercial air-carrier operations is governed primarily by Part II of the *Aeronautics Act*. The Act states that the CTC shall not issue a licence unless it is satisfied that the proposed commercial air service is and will continue to be required by public convenience and necessity (PCN). Current legislation does not attempt to interpret PCN.

Current policy on entry to domestic markets varies widely according to type of commercial operation and also according to geography. Entry requirements are more relaxed in southern Canada than in the north. The test ranges from a relatively restrictive interpretation of PCN for unit-toll services in the north to simple proof of financial viability and compliance with basic technical and safety requirements for specialty services.

Last year's new policy called for the CTC to exempt southern fixed-wing charter operations from the need to prove PCN. The CTC has proposed a regulatory amendment to effect that change and does not appear to have since denied any such applications for entry. However, new helicopter charter operations are routinely restricted to a certain geographic radius from their bases.

The Government proposes to remove the legislated market entry test of PCN in favour of a "fit, willing and able" requirement to control entry. Fitness will be measured by standards not of financial or economic viability, but of technical competence and safety. The primary prerequisite for licensing will be the possession of valid Department of Transport operating certificates, attesting that the carrier is adequately equipped and able to conduct a safe operation. In addition, airlines will be required to carry liability insurance, the amount of which will be specified in regulations.

Removal of the test of public convenience and necessity will provide new opportunities for many segments of the air transportation industry and for many users, especially in the field of local and regional services. Helicopter charter carriers will become as flexible as fixed-wing charters to respond to changing economic circumstances. All air carriers will be able to make necessary adjustments to their services and markets.

In the near term, less scope may exist for reducing regulatory control with respect to those international scheduled air services governed by bilateral agreements with other countries. Nevertheless, the Government recognizes the desirability of less regulation on international routes and is interested in pursuing this theme in negotiations with other countries - for example, in the current negotiations with the United States.

REGULATION OF EXIT CONTROL

Market exit will not be impeded except by a requirement of advance notice.

The current legislative mandate for control of market exit by the CTC is unclear. Although it has controlled market exit to some degree, the Commission is constrained by Section 3(c) of the NTA, which requires that carriers be compensated for services provided as an imposed public duty. The 1984 policy called for the CTC to grant freedom of exit, on 60 days' notice, to carriers faced with new entry. The Commission proposed to amend the Air Carrier Regulations respecting exit so as to require 60 days' notice and written approval by the Air Transport Committee.

If carriers are to be responsive to changing economic and competitive circumstances, they must have reasonable freedom to exit as well as enter markets. Where competition exists, exit is usually not a concern. Where only one carrier is, or would be, serving a route, notice of intent to withdraw would afford an opportunity for a replacement carrier to undertake the service. In cases of exit from captive air-transportation markets of isolated communities, there is little likelihood of total loss of service. Any certified carrier could provide the replacement service. Legal provision for subsidizing an essential service that is not financially viable was incorporated in the recent amendments to the *Aeronautics Act*. However, because subsidies tend to discourage adjustment, innovation, and the development of more cost-effective alternatives, the Government would resort to them only in cases of urgent necessity.

Thus it is proposed that exit will require minimal notice - perhaps 60 days on monopoly routes, 30 days on others.

REGULATION OF AIR CARRIER TARIFFS AND PRICING

There will be no ongoing regulation of domestic tariffs; however, the new Regulatory Agency that the Government is proposing will be empowered, on appeal under an amended Section 23 of the NTA, to review fare increases, and to overturn or reduce such increases. For public-information purposes, carriers will be required to make their tariffs and tolls available at their business offices and to retain a record of all such tariffs and tolls for a minimum of three years.

Part II of the *Aeronautics Act* authorizes the CTC to make regulations respecting traffic, tolls, and tariffs and to disallow or suspend any tariff or toll. The CTC has used this power to require the filing of fares, rates, and tariff conditions for many types of services. Flying Clubs (Class 6), specialty services (Class 7), and long-term helicopter charter contracts have been exempted. Corporate contract services (Class 5) may file copies of contracts instead of the normal tariff.

Freedom of entry and exit in domestic markets and the attendant increase in competition would eliminate the need for continued tariff regulation. Recent Canadian experience with reduced regulation indicates that market forces will produce a wide range of product and price options at a reasonable price to consumers. Amid the general consensus that downward pricing should not be regulated, some argue that control of upward pricing is needed to protect consumers. In order to relieve concerns about unreasonable price increases, the Government sees a benefit in empowering the Regulatory Agency, upon complaint, to review upward pricing, particularly where monopoly routes are concerned.

Consistent with the need for continued regulation of market entry for international services, there will be continued regulatory control of international tariffs.

The public interest will be served by a requirement for carriers to make their tariffs and tolls available for public inspection at their business offices and to retain a record of all such tariffs and tolls for a minimum of three years for reference in case of a complaint to the Agency concerning excessive fare increases. However, these tariff requirements will not extend to charter contracts, which will be left to the discretion of the contracting parties.

AIRCRAFT OWNERSHIP AND FINANCIAL REQUIREMENTS

Air carriers will be able to structure their financing and aircraft acquisition to meet changing operating requirements. Carriers will be required to have adequate liability insurance, the minimum amounts of which will be specified in regulations pursuant to the revised legislation.

The CTC imposes certain aircraft-ownership and financial requirements on actual and proposed licensees. Each licensee operating a commercial air service is required to own or capital-lease at least one aircraft in each aircraft weight group (established by the Air Carrier Regulations) for which it is licensed. Applicants for new or additional commercial air services or for consolidation, merger, lease, transfer, or change of control must comply with minimum requirements for equity and working capital.

The CTC objective in applying these requirements has been to ensure that entrants into the commercial air service, and existing air carriers expanding their business, commence newly authorized services on a sound financial basis. However, in the absence of any routine ongoing financial requirements, there is no assurance that carriers meeting the initial requirements will be capable of providing a reliable, stable air service in the long term.

The CTC's requirements in this area may have discouraged innovation and applications for licences that could well have provided improved services to users. Furthermore, the aircraft-ownership requirements are inequitable in that they place a heavier burden on small carriers than on larger operators with more aircraft in any particular weight group.

Very few carriers can establish themselves without some form of debt financing. The financial institutions backing such operations will certainly be as concerned as the Commission now is about the risk their capital faces, and their concern will increase as route protection disappears. However, in addition to debt/equity and working-capital ratios, financial institutions

consider other factors, such as potential revenues, nature of the proposed service, and managerial experience. Where the financial backers have thus satisfied themselves of a reasonable assurance of success, there should be no need for government bureaucracy to second-guess them.

The CTC's financial requirements can also encourage uneconomic behaviour by preventing a carrier from introducing a service that would actually improve its income and profit position. These requirements may have inhibited innovative aircraft-acquisition arrangements, carrier expansion and competition.

There have been arguments that safety can be improved by maintaining control of the financial fitness of carriers. In the Government's view, the best way to achieve the high level of air safety desired by Canadians is to create an appropriate environment of safety regulations. It is for just this reason that the *Aeronautics Act* has been extensively modernized and made more effective. The changes in this Act strengthen the Government's powers of enforcement, provide Department of Transport employees and the RCMP with authority to detain aircraft considered unfit for flight, and increase fines. Current CTC financial requirements have been of little relevance to the maintenance of safety, in part because they are not ongoing.

One requirement that air carriers must continue to meet, in keeping with the public interest, relates to liability insurance. Liability insurance is essential to ensure that adequate financial compensation will be available in the event of accidents. Pursuant to the revised legislation, regulations will specify the levels of liability insurance required. The insurability of a carrier will also be one indicator of its past and present ability to provide a safe service.

With the elimination of economic entry tests and the financial requirements of licensing, there will be a significant reduction in the financial statistics required of air carriers. The burden of such regulatory reporting has been significant, particularly for small and medium-sized carriers. The Government will ensure that only statistics essential to the safety, maintenance and planning of the civil air transportation system will be required.

LICENSING OF AIR CARRIERS ON INTERNATIONAL ROUTES

Authority for the Minister of Transport to designate Canadian carriers on international routes will be provided for in legislation.

Although the designation of Canadian air carriers for the operation of international air routes negotiated in bilateral air agreements is currently performed by the Minister of Transport rather than by the CTC, current legislation does not explicitly provide ministerial authority in this area.

The Government proposes that, after negotiation of a bilateral air agreement, specific carriers will be designated by the Minister. The Regulatory Agency will issue licences to the air carriers named. Where there are competing Canadian proposals, the Minister may ask the Regulatory Agency to select or advise on the carrier most likely to fulfill the Government's priorities for international transportation. Such is currently the practice in respect of regional and local service between Canada and the United States.

POWERS OF RETALIATION AGAINST FOREIGN ACTIONS

The Canadian Government will be empowered to retaliate against discriminatory or unfair commercial practices by a foreign government or air carrier and against actions jeopardizing the safety of international civil aviation.

Discriminatory or unfair practices by a foreign government or air carrier can have a significant detrimental effect on the interests of Canadian carriers, shippers and the travelling public. Additionally, such actions can threaten the security of Canadian air travellers and carriers. Many bilateral agreements do provide mechanisms for the settlement of disputes through regulatory and diplomatic consultations and through arbitration. However, creating legislative authority for the full range of retaliatory actions that the Canadian Government may wish to take would make those mechanisms more effective, would encourage the timely settlement of disputes and would provide the Government with the power to act in emergency situations and on occasions of overriding national interest.

In the event of such practices on the part of a foreign state or its air carrier(s), the Federal Government should have the power, under certain circumstances, to take retaliatory measures against the air carrier(s) of that state. Such retaliation would be undertaken only with the approval of the Governor-in-Council on the joint recommendation of the Minister of Transport and the Secretary of State for External Affairs.

Railway Freight

Although the *National Transportation Act* of 1967 represented a step towards the regulatory reform of the Canadian railway industry, the Government now proposes a major revision of the existing regulatory regime for rail transportation in Canada, with a view to meeting the needs of both shippers and carriers.

The proposals are designed not only to harmonize the Canadian and American regulatory regimes, but also to better equip the railway transportation industry in Canada to meet the evolving needs of shippers.

CONFIDENTIAL CONTRACTS AND COLLECTIVE RATE MAKING

Section 279 of the *Railway Act* which enables the exchange of information and the establishment of common rates among the railways and Section 32(2) of the *Transport Act* which deals with agreed charges will be repealed. Confidential contracts will be permitted between a railway and a shipper for all domestic, overseas import/export, and transborder traffic, exclusive of grain shipments governed by specific legislation. Rebates will be allowed. No appeals will be allowed from confidential rate contracts.

The *Staggers Rail Act* of 1980 radically deregulated railroads in the United States. Since 1980, U.S. evidence points to a great improvement in the financial performance of railroads, a much more competitive environment, and a wider range of services to shippers. Competitive American railroads operating in a less regulated environment have been able to capture significant transborder business from Canadian railroads.

In late 1984, the CTC was asked to undertake hearings regarding the effects of U.S. rail deregulation on the transborder business of Canadian railroads. In its ensuing report, the CTC recommended that confidential

contracts be instituted for such business. Subsequently, the Minister of Transport asked the CTC to undertake further hearings on domestic rail shipments. The question of confidential contracts for domestic traffic was examined, and again the CTC recommended in favour of them.

The Government has decided to accept the recommendation in favour of confidential contracts. Under the proposed system of confidential contracts, shippers will be able to negotiate a price and a package of services with a railway. Rebates will be permitted, competing railways will not have access to the contracts and there will be no appeal to the Regulatory Agency.

Those shippers who, because of small shipments, remote location, or personal choice, do not wish to utilize confidential contract rates will be able to ship under published tariffs. Appeals will continue to be permitted against published tariffs. The railways, however, will no longer be allowed to practice collective rate-making through sharing information and setting common tariffs.

The Government notes that the recent CTC report supported retention of Section 279 of the *Railway Act* while acknowledging mounting pressure for change and a good deal of dissatisfaction with the clause. On balance, the Government wishes to promote increased competition and therefore favours elimination of the collective rate-making provision.

This mixed system of confidential contracts and published tariffs will lead to a greater level of competition among railways and will offer a wider choice of services to shippers.

TARIFF RECORDS

All confidential contracts and those published tariffs covering shipments that qualify for subsidy under the *Maritime Freight Rates Act* (MFRA) or the *Atlantic Region Freight Assistance Act* (ARFAA) will be filed. All other published tariffs will be retained for public scrutiny in the offices of the railways concerned, pending review after four years.

One objective of economic regulatory reform is to lighten the administrative burden that regulation places on both the public and government. However, the effective administration of the ARFAA/MFRA subsidy programs necessitates the filing of tariffs pertaining to them. Furthermore, the proposed review of rail regulation in four years will require that a suitable base of information be developed. Therefore, the easing of tariff-filing requirements outlined above is considered appropriate, pending the review. The review will devote particular attention to the need for tariff filing, with a view to reducing administrative burden while retaining sufficient tariff information for use in appeals to the Regulatory Agency.

COMMON CARRIER OBLIGATIONS

Common carrier obligations will be retained in full for all shippers but the obligation contained in Section 262 of the *Railway Act* may be modified by agreement of those operating under confidential contracts.

Shippers operating under confidential contracts may well be able to benefit economically through an ability to contract for only those common carrier obligations considered necessary, rather than for a common base of obligations applying to all shippers. Shippers for which confidential contracts are not suitable will continue to have the support of common carrier obligations.

CAPTIVE SHIPPERS' PROTECTION

Section 278 of the *Railway Act* which provides for the fixing of maximum rates for captive shippers has been ineffective and will be repealed. Shippers formerly having access to the line of only one rail carrier will have access to the lines of competing carriers.

The only specific legislative control of maximum rail rates is provided by Section 278 of the *Railway Act*. Under this provision, a "captive" shipper is defined as a shipper for whose goods there is "no alternative, effective and competitive service by a common carrier other than a rail carrier". If a captive shipper is

dissatisfied with a rate negotiated with a railway, he can apply to the CTC for a determination of the "probable range" within which a "fixed rate" would fall. The fixed rate, or "key maximum rate", is the variable cost of the movement, based on a carload of 30,000 pounds, plus 150% of variable cost. The shipper, upon being informed of the probable range, may apply to the CTC to fix a rate within the range. The shipper would be then obliged to accept the fixed rate and to move all of his goods by rail for at least one year (and as long as the fixed rate remains in force), except for experimental shipments moved by other modes.

Although several rate cases before the CTC have referenced Section 278, only one has proceeded through all the steps laid out in the legislation. The section is considered difficult in three respects: the requirement that a shipper be "captive" to rail, the 30,000-pound carload base, and the 150% markup over variable cost. Therefore, the provision will be repealed in favour of a "family" of appeal provisions encompassing mediation, final-offer arbitration, and a more workable, equitable, and effective appeal mechanism in the NTA.

Despite the additional appeal mechanisms, captive shippers may well continue to be at risk in a rail transportation environment characterized by only two main railways. Wishing to encourage competition in all segments of the transportation system, the Government proposes to allow shippers captive to one rail line to have access to the lines of competing rail carriers, through provision in legislation for a joint-line rate from the traffic's origin to its destination.

RUNNING RIGHTS AND JOINT-TRACK USAGE

In instances where the public interest or consideration of the economy and efficiency of the rail system justifies the imposition of joint-track usage or shared railway running rights, the Governor-in-Council will be empowered a) to elicit railway co-operation and b) to authorize the Regulatory Agency to determine appropriate compensation for the use of the right-of-way concerned.

In its proposals for regulatory reform, the Government must consider what is likely to serve Canada well in the years to come. For example, the future efficiency and effectiveness of the transportation system may well warrant various forms of rail rationalization, such as the possible sharing of roadbed down the Fraser-Thompson River corridor of British Columbia. Therefore, a clause will be inserted in new legislation (accompanying Section 134 of the *Railway Act* covering railway-initiated action) to authorize Governor-in-Council action in those unusual instances where government intervention is warranted in the national interest.

This power would be used only in exceptional circumstances where significant efficiencies and cost savings would be certain to result. The objective would be to keep transportation costs to users as low as possible and thereby enable them to maintain their competitiveness in their marketplaces.

MINIMUM RATE REGULATION

Section 276 of the *Railway Act* requires that a railroad's rates be compensatory. This section will be made subject to a sunset provision under which it will be repealed in five years. During that five-year period, railways may apply to the new Regulatory Agency for limited use of non-compensatory rates for market-development purposes. Anticombines legislation will apply to predatory pricing.

The Government realizes that the charging of non-compensatory rates over extended periods is not desirable when done for anticompetitive reasons. However, in a less regulated environment railways should be given greater pricing freedom to enable them to adjust to market pressures. Therefore, limited use of non-compensatory rates will be allowed over an adjustment period of five years after which there will be no restriction on such rates except anticombines legislation.

BRANCH-LINE ABANDONMENT[3]

The Government proposes to adopt a comprehensive approach to branch-line abandonment that will facilitate the development of innovative options for improving transportation services and the continued use of branch-lines where feasible. An additional protection for "grain-dependent" branch lines will be maintained; the Order-in-Council that protects the majority of these will have to be altered before abandonment proceedings commence. Under appropriate circumstances, lines other than branch lines may be abandoned.

No branch line, regardless of category, may be abandoned except on successful railway application under Section 256 of the *Railway Act*. The applicant railway is eligible for 100% of loss subsidy 90 days from the date of application. Current legislation fails to provide a railway thus subsidized with any further incentive to reduce costs, to solicit revenue or to invest in the line.

The CTC may decide that the branch line be either abandoned on a specified date or retained. In the latter event, the case must be reviewed within five years and at five-year intervals thereafter until the Commission decides that the line should be abandoned or until the line ceases to be uneconomic. This procedure poses problems in that: 1) a conditional abandonment cannot be made (e.g., conditional upon the building or upgrading of a road); and 2) the five-year retention period does not allow adequate time for either railways or shippers to make investment decisions, should they wish to do so.

The Government currently has no legislative control over the disposal of an abandoned right-of-way. No provision exists for a third party to acquire the land and railway infrastructure as a going railway concern. This lack of encouragement militates against the possible retention of rail service by other parties, despite the increasing interest in short-line railway operations.

3. The recommendations of the CTC on branch-line abandonment will be considered in the formulation of new legislation.

In the revised Act, in the case of non-protected branch lines, the railway will give public notice of its intention to abandon at least 120 days prior to filing an application for abandonment. The railway will not have to prove an operating loss. In the case of a protected line (the vast majority of which are "grain-dependent"), the Minister of Transport will first have to be convinced of the appropriateness of recommending variance of the Order-in-Council protecting the line.

An interested party may, within 90 days, approach the railway and reach an agreement to acquire the branch-line assets. In the event of dispute, the Regulatory Agency would determine appropriate compensation.

If the parties reach an agreement within the 90-day period, the purchaser will apply to the Agency for permission to operate a short-line railroad. If no objections are filed within 30 days, the Agency will automatically approve the application. In the case of a new federally controlled line, a "fit, willing and able" requirement will apply. In the case of a line to be provincially regulated, the new legislation will allow for a smooth transition from federal to provincial jurisdiction.

If there is no application by a short-line company, the railway, having filed notice of intent to abandon, will file an abandonment application. If no objections are received within 30 days, the Regulatory Agency will immediately issue an abandonment order. In cases of objection, a branch-line-abandonment hearing will be held. Following the hearing, the Minister may consider the utility of providing the railway or some other party with a subsidy to operate the branch line. However, the case will have to be strong for the Government to take such action.

The incorporation of time limits will, in itself, remove the current serious weakness that a hearing may not be held for several years. In addition, legislation could be drafted to permit railways to transfer assets at any time to an interested entity. Such assets, though possibly still of use to the railway company, would offer greater prospects for the potential buyer. The major carrier and the prospective operator would negotiate a takeover deal, including all necessary operating interfaces and revenue divisions.

In some cases, total system costs could be reduced by an exchange of branch-line ownership, possibly following the construction of a connection or the granting of running rights between railways. Section 255 of the *Railway Act* gives the Commission powers only to recommend these changes to railways. In cases where a railway has indicated an intention to abandon a line, the Minister should have the power to enforce such recommendations.

Extraprovincial Trucking

The extraprovincial trucking industry has become an important force in linking shippers to their markets. However, because legislation and regulation have not kept pace with Canada's economic development, the federal and provincial Ministers of Transport are co-operating closely in the regulatory reform of the trucking industry, with particular attention to the standardization of differing provincial regulations across Canada, and the easing of entry and exit requirements. The object of this reform is to provide the industry with greater means for more economic and flexible service to shippers and to reduce the administrative burden of regulation.

Constitutionally, jurisdiction over trucking is divided between the federal and provincial governments, but federal economic regulatory responsibilities have been delegated to the provinces since passage of the *Motor Vehicle Transport Act* (MVTA) in 1954.

The Government proposes to revise the MVTA to reflect the conditions of the agreement signed by the federal and provincial Ministers of Transport on February 27, 1985. The Government will also change the current NTA criteria for entry and rates.

Significant progress towards economic regulatory reform was made on February 27, 1985, when the federal/provincial Council of Transport Ministers agreed upon a number of specific steps to implement the first phase of regulatory reform of the extraprovincial trucking industry. These steps involve shifting the burden of proof on entry from the applicant to the respondent; eliminating rate approval; creating a list of commodities and services exempt from control; streamlining operating licences and licence categories; and streamlining the licence application process. The MVTA will be modified to reflect these reforms.

Federal and provincial ministers have also agreed upon a second stage of reform which will assess the socio-economic effects of eliminating the test of public convenience and necessity in favour of a fitness test and eliminating rate filing.

Part III of the NTA is the instrument by which the Government could exercise its responsibility, both to users and operators, for the extraprovincial trucking industry. If retained in its present form, this provision would remain outdated with respect to truck transportation and would not enable the Government to show leadership in regulatory reform.

The Government proposes to change the entry criterion in Part III of the NTA from a test of "public convenience and necessity" to a "fit, willing and able" requirement. The control of rates and fares will be removed.

The Government recognizes the need for a strong Canadian trucking industry and will collaborate with the Provinces to ensure its continuation.

In view of the importance of safety to the economic well-being of trucking, consultations will be undertaken with the Provinces to discuss federal/provincial co-operation in the development of a consistent national safety program for the industry.

Marine Transportation

Marine transportation regulation is found in the *Shipping Conferences Exemption Act*, the *Canada Shipping Act*, the *Inland Water Freight Rates Act*, and the *Transport Act*. The major legislative proposals presented below are based on the following objectives:

- maintenance of the competitive position of Canada's shippers, carriers, and transportation systems (both inland and ports);
- harmonization of transportation legislation with other legislation;
- protection of Canadian interests from unfair foreign practices; and
- removal or reduction of all unnecessary regulatory costs.

SHIPPING CONFERENCES EXEMPTION ACT (SCEA)

The Government proposes to revise the *Shipping Conferences Exemption Act*. While shipping loyalty (patronage) contracts will still be possible, confidential contracts with individual conference members will also be permitted. Shipping conferences will be allowed to quote multimodal rates, but safeguards against collusion in the setting of such rates will be implemented and independent carrier action encouraged.

International conferences play a major role in the movement of goods between Canada and abroad. They are organizations of ocean-shipping carriers which enforce a code of conduct, including rates and levels of service, in return for arranging scheduled services. A key feature of conference operations is the control of price competition; member lines must adhere to a common tariff. To restrain internal competition, shipping

conferences usually limit the number of sailings each member can make, restrict the amount of cargo which each member can carry and restrict the ports they serve. In some cases, revenue pooling among members may also be employed.

The current SCEA does not require a shipper to enter into a 100 percent loyalty contract with a conference carrier. In practice, however, conferences generally insist upon such an agreement in return for special considerations, including rebates on tonnage shipped. Alternatively, a shipper can forego loyalty contracts and look for a more suitable arrangement either inside or outside the conference.

The present SCEA also protects the conferences from anticombines prosecution, provides limited Canadian controls over their activities, and promotes the Canadian Shippers' Council as a check against their powers. Conferences must meet with a designated shippers' group on request. The legislation's expiry date was recently extended to March, 1986.

The Government recognizes that it is not feasible to eliminate the conference system. Rather, it is necessary to find the best means of regulating conference operations so as to produce the greatest benefit for shippers.

Recent American legislative reform has substantially updated its approach to shipping conferences. Confidential contracts are now allowed. Safeguards have been introduced against collective action by ocean carriers in negotiation with inland carriers. Conference members have been granted the right of independent rate action without loss of conference membership. Shippers' associations can now engage in negotiations with international carriers. Legislation makes the conference system more responsive to customers and minimizes government intervention and regulatory costs.

The Government proposes to establish a more flexible system in Canada. The current regime of rate setting and loyalty contracts will be available to shippers who wish it. However, legislative provisions will prohibit conference carriers from requiring shippers to transport 100 percent of their cargo under loyalty contracts. Shippers will be able to negotiate confidential service contracts with individual conference members. These

confidential contracts would specify rates which may differ from conference rates, levels of service, degree of loyalty, if any, and other matters.

Confidential contracts will be filed to provide information for monitoring the effectiveness of the proposed changes. This requirement will be reassessed in the review of regulatory reform after four years.

The right of independent action by conference members on rates or levels of service will be provided in legislation. This will promote increased competition within the conference system. Legislation will clearly prohibit predatory conduct.

Legislation will also include specific safeguards against conferences participating in the setting of multimodal (waterborne plus inland) rates. Only individual conference members will be allowed to negotiate with individual non-ocean carriers.

CANADA SHIPPING ACT (CSA)

The *Canada Shipping Act* will be revised to reserve the coasting trade for Canadian ships; to extend the jurisdiction of the Act to 200 nautical miles or to the limits of the continental shelf, whichever is greater; to expand the scope of the Act to include all commercial marine activities except for fishing; and to retain the waiver system, with specific provision for conditional exemptions.

The only form of economic regulation in the Canadian coasting trade is ship registration. Although the coasting trade is currently reserved for Commonwealth vessels, the Great Lakes are reserved for Canadian vessels only. A waiver system exists for authorizing use of a foreign vessel where suitable Canadian ships are unavailable. The legislation is unclear in respect of its application to the cruising trade (i.e., the carriage of goods and passengers from one place in Canada back to the same place in Canada) and fails to cover other marine activities such as offshore exploration, offshore production development, dredging, and seismic survey. The provisions apply only to the territorial sea (12 nautical miles) and Canadian inland waters. Several issues must be resolved in order to reconcile the Act with other legislation, such as the *Customs and Excise Offshore Applications Act*,

which may impose duty upon vessels involved in shore exploration and development.

The extension of the jurisdiction of the CSA to 200 nautical miles or to the limits of the continental shelf and, with the exception of fishing, to all commercial activities in Canadian waters would be a logical step towards reconciling transportation legislation with other legislation in Canada.

The retention of a waiver system is necessary for those instances where the supply of Canadian ships is insufficient to meet the demands of the coasting trade and offshore activities. Thus, foreign-flag ships will continue to be permitted to satisfy temporary requirements in Canada.

LEGISLATION IN THE GREAT LAKES REGION

The Government proposes to repeal the *Inland Water Freight Rates Act* and the provisions of the *Transport Act* pertaining to the Great Lakes area.

The *Inland Water Freight Rates Act*, for which the Minister of Agriculture has responsibility, empowers the Canadian Grain Commission to prescribe maximum rate levels for grain carried from Thunder Bay to any port or place in Canada or to the U.S.A. Although the Canadian Grain Commission has the power to roll back rates, amounts that carriers have collected in excess of maximum rates cannot be recovered.

No bulk commodity other than grain is subject to such regulation in the Great Lakes. Sufficient competition exists among carriers that sell services to a single buyer, the Canadian Wheat Board. The Commission has not yet had cause to prescribe any maximum rates. These factors outweigh any argument for retaining the Act on the basis that it prevents carrier abuse.

The *Transport Act* regulates entry, capacity, and rates on passenger and non-bulk traffic between L'Ile d'Orleans and Thunder Bay. At present, there is only one such service. The competitive nature of the transportation system in the area does not require the retention of such legislation and regulatory control.

MARINE FREIGHT TRANSPORTATION IN THE NORTH[4]

Transportation in the north faces severe difficulties, given that freight cargo must be moved on a reliable basis in a short time. This requirement results in high unit costs. Intramodal competition is restrained by Northern Transportation Company Limited's control of 80% of the tonnage regulated by the *Transport Act*.

Recognizing the special needs of northern transportation, the Government favours the retention of the regulation of community resupply while making changes in the *Transport Act* to streamline the regulatory process respecting entry, licensing, and rates.

The Government proposes to license northern community resupply services on the basis of total ship tonnage and the geographical scope of services.

The statutory definition of ships in Section 2 of the *Transport Act* makes the Act applicable to ships grossing in excess of 500 tons, except in the Mackenzie River system, where the Act applies to ships of 10 tons and more. In addition, the clause that limits ship licensing to British ships is contradictory to changes refered to earlier to reserve Canada's coasting trade for Canadian-registered ships only. New legislation will allow the employment of only Canadian-registered vessels and will put transportation in the north under the same basic regulatory regime as for the rest of the country.

The current conditions applying to licences include restrictions on the capacity of individual ships whose licences are issued in the name of the owner. This condition affects the transfer, temporary or permanent, of licensed ships between existing operators, as well as the sale of a licensed ship from one operator to a new one, since CTC approval is required for such transactions. The proposal to issue a licence with restrictions on fleet capacity rather than individual ship

4. A CTC report on the regulation of marine operations on the Mackenzie River will be available later this year. The recommendations of this report will be considered in the formulation of legislation.

capacity will give operators greater flexibility to use the most-suitable ships and to transfer ships among themselves. New operators, when buying existing ships, will be subject only to a "fit, willing and able" entry requirement.

The terms and conditions of licences will specify the geographical areas of the community resupply service and facilitate the future provision of reliable service for permanent communities.

The Government proposes to authorize northern licences for indefinite as well as for fixed durations, as circumstances require, including licences of charter operations.

CTC approval for licences to operate is for one year only; applications for any other period require Governor-in-Council approval. This situation creates operational problems and contributes to a carrier's uncertainty in guaranteeing ongoing uninterrupted use of its equipment. The time consuming process and the uncertainty of success in applying to the CTC and obtaining Governor-in-Council approval have inhibited applications for licences. Providing the Regulatory Agency with authority to cancel or suspend licences for violation of its conditions will ensure protection of the public.

Northern carriers will be required to file one set of freight rates based only on weight and distance, taking into account geographical and navigational differences for specific areas of the regulated system. The tariffs will be made public but will not require the Regulatory Agency's approval. Rates may be overruled by the Regulatory Agency on grounds of discrimination or unreasonableness, as proven by users through the dispute-resolving mechanisms mentioned in the paper.

The initial objective of the *Transport Act* was to regulate the marine competitors of the railways in the Great Lakes area. It was subsequently expanded to regulate northern marine freight transportation. The rate-regulation concepts contained in the Act involve several freight rate classifications framed against the background of pre-1967 experience with railway rates. Not only does the current rate structure not reflect the cost characteristics and peculiar conditions of water transportation in the north, but it is also outdated with respect to changes introduced in the NTA of 1967.

The changes proposed address the problems of modernizing the rate regulation of northern transportation. The system will therefore be easier to manage, be more flexible in adjusting the users' and carriers' transportation conditions, and require less government intervention.

The Government proposes to exclude from regulation all charter or unscheduled services operated in support of northern resource exploration and development.

The proposal will confirm the status of those services already operating in an environment of unregulated tariffs and tolls. Specific safety measures will continue to apply under the CSA.

Commodity Pipelines

The Government proposes to greatly relax the regulatory process for licensing commodity pipelines. There will be a "fit, willing and able" entry requirement, but no rate regulation. The Minister of Transport will be responsible for regulating the safety of such lines.

Commodity pipelines that cross provincial, territorial, or international borders are currently subject to the jurisdiction of the CTC.

The existing regulatory authority of the CTC includes: 1) issuing certificates of public convenience and necessity; 2) controlling the filing, substitution, or prescription of tariffs; 3) hearing applications for acquisition or abandonment of commodity-pipeline operations; 4) resolving disputes or public-interest matters; 5) setting standards, procedures, rules, and regulations to facilitate conduct of its duties; and 6) safety. The CTC has jurisdiction, duties, and powers similar to those exercised by the National Energy Board under Parts III and V of the *National Energy Board Act* (NEBA); indeed, to the extent that they are not inconsistent with Part II of the NTA, certain sections of the NEBA apply equally to a commodity pipeline.

The CTC's regulatory activity to date has centred on the processing of a 1982 application for certification of eight process lines and one short, high-pressure, super-heated steam line; and on the certification of several other similar short-distance pipelines that were operating without necessary approval.

In accordance with the Government's intent to lessen the regulatory burden and open up transportation industries to competitive market forces, reduced regulatory tests are highly desirable for commodity pipelines. Entry should be open to those who can meet appropriate safety and insurance tests. Prices should not be regulated. Jurisdiction over "combined" pipelines will be left to the NEB.

The Regulatory Process

The manner in which regulations are implemented can have great implications for those involved in transportation. Regulation is, after all, a quasi-judicial administrative process, and the decisions of the Regulatory Agency affect carriers, shippers, travelers and other consumers.

The independence of the Regulatory Agency must be preserved. The proposed changes to the regulatory regime and philosophy are significant, however, and require corresponding changes in the administrative powers, practices and perspectives of the regulatory agency.

NEW REGULATORY AGENCY

In keeping with the spirit of regulatory reform, a new independent Regulatory Agency will be created to replace the Canadian Transport Commission.

Because of a reduced role due to lessened economic regulation, and because of a new emphasis on promoting multimodalism and equitable regulation of all the modes, the organizational structure of the new Agency will probably differ from that of the CTC. Legislation will also permit the Minister and the Regulatory Agency, in consultation, to determine what adjustments in structure over time will best meet changing circumstancs.

From time to time, issues before the Regulatory Agency will be technically complex; private-sector expertise may be better able to address them. For this reason, special commissioners may be appointed to participate in certain inquiries or decisions.

The Government is considering the merits of establishing a decentralized Regulatory Agency with western, central, and eastern branches, to bring regulation closer to the marketplace. Decentralization would necessitate some co-ordinating mechanism to ensure that the regulatory regime remains harmonious and promotes the best interests of the national transportation system. The representations of shippers, carriers, labour and consumers will be important in the Government's consideration of such a decentralized structure.

Many employees of the CTC possess invaluable knowledge and expertise on the national transportation system. The Government intends to draw on these resources in creating the new Agency.

MINISTERIAL POLICY DIRECTION

The revised legislation will confer upon the Minister, with the approval of the Governor-in-Council, the power to issue policy directions to the Regulatory Agency on matters falling within the jurisdiction of the Agency and will make such policy directions binding on the Agency in its consideration of matters before it.

At present, the CTC takes its direction from its interpretation of the legislation. The Government can give only indirect policy direction to the Commission by appointing commissioners or by overturning decisions on appeal. In the past, the Government has often failed to provide an elaboration of the policy principles outlined in the NTA and the CTC has had to rely on its interpretation of policy direction in legislation.

The Government proposes to assume responsibility for policy, and to provide clear direction. Therefore, the Minister will be empowered to issue policy directions to the Agency on matters falling within its jurisdiction. This provision is a means to ensure that regulatory action is compatible with government policy. Policy directions, when approved by the Governor-in-Council, will be tabled in the House and be binding on the Agency. The power to set the broad policy of the Agency will assist the Government in fulfilling its commitment to ensure stability and consistency in the regulatory regime.

In the context of legislation and government policy, the Regulatory Agency will continue to make decisions based on the circumstances of specific cases. The Government will not have a mandate to interfere in specific cases or issues before the Agency. The Governor-in-Council will hear appeals from Agency decisions and will make regulations under the revised Act.

HEARINGS

The Regulatory Agency will be empowered to inquire into, hear and report on any transportation matter that, in the opinion of the Minister, affects the public interest.

An important function of the new Regulatory Agency will be to conduct hearings on matters of public interest. From time to time, the Minister may refer issues to the Agency for hearings. The Government will be able to draw on the results of such hearings in addressing important policy issues and use this mechanism to explore areas of high public interest.

In each case, the Minister will establish terms of reference for the subject and conduct of the hearing, such as whether interim reports are required and whether the hearing will be headed by regular Agency commissioners or by external appointees (special commissioners).

In cases where the Regulatory Agency could be perceived as having a conflict of interest or where the hearings are likely to be lengthy, the Minister may initiate special hearings with the power to draw on Agency resources as required.

Dispute-Resolving Mechanisms

The Government wants the dispute-resolution processes now in legislation to be more effective and efficient. These processes should be simplified, and made less adversarial, more accessible and less expensive to use. Therefore, the Government proposes to establish in legislation a family of problem-solving mechanisms, encompassing mediation, final-offer arbitration and the continuation of current Section 23 NTA appeals against actions considered contrary to the public interest. A reparations provision will apply in the latter two cases.

MEDIATION

The Government proposes that a mediation function be included in legislation as a relatively informal means of resolving disputes between shippers and carriers.

The CTC currently offers an informal mediation service in instances where a shipper has filed a complaint or formally appealed with the Railway Transport Committee. The format varies from case to case but all parties must agree to the request in order for the CTC to mediate the dispute.

Although no change to the mediation format is proposed, the incorporation of a mediation provision in legislation will further publicize the availability of the mediation service and hence make the system more receptive to shippers and carriers. If mediation does not resolve the dispute, the exercise will nevertheless give the contestants a greater understanding of the difficulties facing each other and of the subsequent procedure for requesting either final-offer arbitration or an appeal under the revised Section 23. Moreover, the Regulatory Agency will thereby acquire a clearer understanding of the issues and their background.

SECTION 23 (NTA) APPEAL PROVISION

Section 23 of the NTA will be retained in modified form. The Government will eliminate the requirement that a *prima facie* case be established before the Regulatory Agency may grant leave to appeal and proceed with an investigation. Section 23 will be clarified to confirm that shippers served by only one carrier in a specific mode have access to the appeal process. The legislation will also allow the Regulatory Agency a choice between a public hearing or a file hearing and will provide for the refund of rates charged and later found to be excessive. Time limits for the different stages of the appeal process will be established.

Currently, Section 23 is a broad appeal mechanism that may be used by any person who believes that an act or omission on the part of a carrier (under federal jurisdiction) or a rate established by a carrier prejudicially affects the public interest. The process involves two stages: the CTC first determines whether a *prima facie* case exists; if so, the CTC then proceeds to investigate the complaint. The public interest provision at the *prima facie* stage is defined to include (but not be restricted by) the national transportation policy stated in Section 3 of the NTA. A narrow interpretation of that policy can significantly constrain the effective use of the appeal process.

With respect to rail transportation, tariff increases, once allowed, remain in effect until they expire, are superseded, or are disallowed. In the case of Section 23 appeals, the tariffs remain in effect and must be paid by the shipper until a decision on the case is reached. Of the eight Section 23 appeals heard by the CTC since 1967, five have taken more than one year to conclude (three of the five having taken three to seven years), and three have taken less than one year. If a judgment is rendered in favour of the shipper, current legislation contains no provision for the CTC to order the carrier to make restitution of the previous charges judged excessive.

Section 23 of the NTA has been perceived as ineffective in permitting appeals in situations where effective intramodal competition does not exist. Therefore, Section 23(3) will be amended to include specific protection for shippers served by one carrier of a single mode.

The *prima facie* stage will be eliminated in order to allow the Regulatory Agency to move directly to a consideration of the issues raised in the complaint. Elimination of this stage will expedite the disposition of appeals.

Section 23 will be amended to permit the Regulatory Agency to decide whether to hold a public or a file hearing. Allowing the Regulatory Agency this latitude should further expedite the consideration of appeals and reduce the expense of hearings. However, the public-interest component will be retained.

New legislation will contain a reparations provision. Where a rate is disallowed, carriers will be required to refund overcharges, plus interest, from the date the appeal was filed. This requirement is consistent with natural justice and will remove a financial incentive for delay.

Section 23 appeal proceedings tend to be very lengthy, often because of the nature of the cases, the importance that the contestants attach to them and the amount of information to be amassed and researched. Section 23 proceedings are often referred to the Federal Court of Canada on points of law. In 1983, an effort was made to expedite the appeal process by modifying the General Rules of the CTC so as to set time limits for each stage. The new legislation will maintain realistic time limits on the various stages of the appeals process.

FINAL-OFFER ARBITRATION

Legislation will incorporate a final-offer arbitration mechanism for resolving disputes of private or narrow interest.

Financial and other commercial considerations can effectively obstruct small and/or local shippers from invoking Section 23. Local railway or shipper disagreements may not easily fit the broad public interest test. Hence, a final-offer arbitration mechanism is being proposed to meet the requirement for speedy, effective resolution of disputes in such cases of private or narrow interest.

The government is not proposing a dual-appeal procedure but rather two mutually exclusive processes: Section 23 will apply to public interest issues; final-offer arbitration will apply to cases of private interest. A complainant in a dispute will have the option of either appealing to the Regulatory Agency under Section 23 or requesting final-offer arbitration. Once the preferred route is selected, the complainant will be prohibited from later seeking resolution of the dispute through the other mechanism.

For those unusual instances where a request for arbitration involves significant public interest considerations, the Regulatory Agency will be empowered to order resolution of the dispute through Section 23. The investigation upon which such a decision is based will be done quickly, within ten working days. However, if the Regulatory Agency decides that public-interest considerations are not sufficiently significant, the arbitration process will then commence.

It is critical that the arbitrator be independent, impartial, and experienced in the relevant transportation matters. The arbitrator will be chosen by agreement of the disputing parties or, in the absence of such agreement, appointed by the Regulatory Agency. The name could be drawn from a list previously agreed upon by carrier and shipper representatives.

The power of the arbitrator will be confined to the selection of one or the other of the final positions presented by the parties. No power will be granted to modify the final positions or to consider, or rule upon, questions of law or jurisdiction. The necessity for the arbitrator to select one of the final positions will prompt the contestants to negotiate in good faith and attempt to reach their own resolution. Unless modified by mutual agreement, the decision of the arbitrator will be final and binding on each party for a period of one year. The entire proceeding will be completed within 90 days of the date when the request for arbitration was filed or when the Regulatory Agency confirmed that the dispute should be resolved through arbitration rather than Section 23. No further appeal will be allowed, other than to the Federal Court on questions of law or of jurisdiction.

As with the Section 23 provisions, the arbitration process will provide for a refund, plus interest, of the portion of the rates found to be excessive.

APPEALS FROM THE REGULATORY AGENCY

The review function currently performed by the Review Committee of the CTC will be discontinued. The Governor-in-Council and the courts are sufficient avenues of appeal.

The Governor-in-Council will be empowered to vary or rescind, at any time, either on petition from a person or party or on his own motion, any order, decision, rule or regulation of the Regulatory Agency.

Current legislative provisions that permit appeals to the Minister in licensing matters involving commercial air services, motor-vehicle undertakings and transport by water will be repealed.

An appeal from the Agency to the courts upon a question of law or of jurisdiction, would continue to apply.

With reduced regulation and greater powers of policy direction over the Agency, it is expected that fewer petitions will be made to the Governor-in-Council. However, in spite of the proposal for a much improved dispute-resolving process, it is still felt that an avenue of appeal from the decisions of the Regulatory Agency should be provided. In all cases, appeals will be made to the Governor-in-Council or to the courts.

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